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Part I Sources of Law

Chapter 1 Introduction

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58. The Italian legal system belongs to the civil law legal tradition, and therefore rests on a codified system of rules serving as the primary source of law. As a consequence, the primary source of Italian law is created by national and subnational legislatures in the form of legislation. Although the Italian legal system is mainly codified, custom is a source of law as well. But it cannot run counter to the application of legislation nor originate legal norms conflicting with written provisions (custom *secundum legem*). This means that custom cannot act *contra legem*. To put it another way, customary law can only fill in gaps left by written law, and, where it is found to be legitimate, it may merely integrate written legislation (custom *praeter legem*). If it were the case, custom satisfies the requirements in order to be recognised as a source of law. A typical example of custom *secundum legem* is trade custom, i.e., a practice adopted in business and mercantile transaction that has such regularity of observation in a place as to justify an expectation that it will be observed with respect to the transaction in question. Trade custom complements written legislation, providing that law explicitly refers to it (Article 8, General Provisions of the 1942 civil code). Custom is also a source of law at the constitutional level; the topic has been debated by scholars. Nevertheless, it is possible to recognise room for its existence. Firstly, the Constitution does not lay down a detailed regulation of all the relevant aspects of the State organisation. Thus, custom can integrate the black-letter constitution. Secondly, the Constitutional Court credited the existence of customs at the constitutional level in the case of constitutional organs' financial records, no-confidence motion towards a single minister, and parliamentary legislative process.[1]

59. The Constitution does not list all the sources of law. An incomplete list can be found in Articles 1–4 of the General Provisions of the Civil Code enacted in 1942 – i.e., prior to the Constitution – which do not take into account the sources of law subsequently introduced by the same Constitution. Articles 1–4 of the General Provisions of the Civil Code arrange the sources of law on a hierarchical scale, which is based on their

[1] See CC n. 129/1981, n. 7/1996, and n. 140/2008 respectively.

legal force. Thus, we find statutes, regulations, corporative norms, and customs. Provisions referring to corporative norms are no longer in force, since they were repealed after the defeat of Fascism and the dismantling of its corporative system.[2] Corporative norms should now be replaced by collective labour agreements under Article 39 of the Constitution. This provision, however, has never been implemented (see above, General Introduction Chapter 2).

60. The Constitution does not lay down a comprehensive list of the sources of law of the Italian legal system. Indeed, the constitutional text only refers to primary legislation and constitutional laws. Unlike the *Statuto Albertino*, the 1948 Constitution has experienced a remarkable increasing in the number of sources of law. For instance, the Constitution added new sources at the constitutional level, having a force superior to that of the acts of Parliament, such as constitutional statutes amending the Constitution and constitutional statutes that are not formally incorporated in the body of the Constitution. Moreover, as Italy has a regional framework, the Constitution distributes legislative powers between the national and regional orders of government (Article 117 of the Constitution). Furthermore, the Constitution sets *ad hoc* sources, i.e. sources that regulate specific subjects, such as the relationships between the State and the Catholic Church (Article 7, II), as well as between the State an other religious denominations (Article 8, III). In other words, Italy has a pluralistic-oriented constitution: there are numerous legal sources, and several entities are entitled to legislate.

61. The sources of law the Constitution sets forth are mainly constitutional statutes and primary legislation. Parliament is not allowed to introduce any other primary sources of law. If it intends to do so, it has to change the Constitution by resorting to the constitutional amending formula set forth in Article 138 of the Constitution. In addition, the Constitution does not regulate secondary or subordinate legislation that is made by the executive to whom Parliament has delegated part of its law-making power. The sole references to subordinate legislation are to be found in Articles 87 and 116, VI, of the Constitution. Whereas Article 87 refers to the enactment of executive regulations by the President of the Republic, Article 116, VI, allots subordinate legislation powers among the different tiers of government. As a consequence, secondary legislation is 'open' to changes and integrated by subsequent acts of the legislative branch. The subordinate legislative process and all

[2] See the Royal Decree-Law n. 721/1943 e the Order in Council enacted by the Lieutentant of the Kingdom n. 369/1944.

types of regulations can be found in Law No. 400/1988, as amended by Law No. 69/2009. At the regional level, regional basic laws regulate secondary legislation, whereas bylaws are the means through which local authorities can make binding rules under such enabling legislation as Article 7 of the Legislative Decree No. 267/2000.

62. Such a high number of sources of law may be classified according to different criteria, which are particularly useful in order to solve antinomies between conflicting norms.

There are three criteria for solving antinomies: the chronological criterion, the hierarchical criterion, and the criterion of competence. The chronological criterion applies between laws enacted by the same legislative body, or between laws with general or equal competence and rank: between statutes of the National Parliament; between two statutes of the same Regional Legislature; between a statute of Parliament and acts with force of law (legislative decrees, decree laws, etc.). If there are two inconsistent or conflicting statutes, the latter repeals the earlier to the extent of the inconsistency (*lex posterior derogat priori*).[3]

The hierarchical criterion applies between sources arranged on a hierarchical scale. The source of law with higher rank triggers the invalidity of the those with lower rank that are inconsistent with the former. For example, subordinate legislation must be consistent with primary legislation; where there is inconsistency between primary and subordinate legislation, the former prevails.

The criterion of competence refers to sources of law, to which the Constitution confers the regulation of a specific matter to the exclusion of the others. For example, the internal organisation of the Houses of Parliament is a matter reserved to their own rules (Article 64 of the Constitution). A source without jurisdiction regulating a reserved matter is invalid and can be challenged before the Constitutional Court. In certain cases, it is necessary to apply different criteria in order to solve antinomies between sources of law. For instance, both the criterion of competence and the hierarchical criterion are applied to regulate the relationship between the acts o Parliament and regional laws.

Chapter 2 External Sources: International Law

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[3] See CC. n. 49/1970 and n. 63/1970.

63. The Italian system is an 'original' one: it draws from itself its own effectiveness. In this respect, it considers the system of international law – as well as those of foreign countries – as separate. In order to incorporate international law into domestic law, legislative action is required. As a consequence, all international sources must be incorporated in order to produce legal effects in the domestic legal system. The Italian legal system is thus impermeable to legal rules laid down by external sources unless it allows them to acquire legal relevance within it. This entails a limitation of State sovereignty: such limitation works automatically when the same Constitution upholds such a possibility, such as in the case of international customary law (Article 10, I, Constitution). As for international treaties, their incorporation requires legislation. The ranking given to international provisions depends on the provision incorporating the treaty. Thus, customary norms acquire quasi-constitutional ranking; international treaties enjoy the same ranking as the internal provisions. The Italian legal system has connections with the international, foreign, and the European legal systems. These connections are regulated by procedures and rules, and differ from each other in terms of importance and effectiveness.

§1 INCORPORATION OF INTERNATIONAL LAW INTO DOMESTIC LAW

64. How international law is incorporated into the Italian legal system depends on the nature of the source. Thus, international customary law and international treaties are incorporated according to different procedures.

§2 INCORPORATION OF CUSTOMARY INTERNATIONAL LAW

65. 'Customary law' is a source of law. On the one hand, it requires a general and consistent practice of States within the international community ('objective component': *usus* or *diuturnitas*). On the other hand, such practice is followed out of a sense of legal obligation: the international actors consider it to be law and observe it on the grounds of its binding legal effects ('subjective component': *opinio juris ac necessitatis*).

    Under Article 10, I of the Constitution, Italy automatically incorporates 'the generally recognised tenets of international law' (international customary rules) into its legal system. Pursuant to Article 10, I of the Constitution, incorporation of customary international law is then accomplished through a mechanism of automatic incorporation. It is what Italian jurisprudence calls 'mobile' (or 'formal') reference to the rules produced by international sources at customary level.

It should be argued that 'the generally recognised tenets of international law' also refer to those international treaties and covenants on human rights protection, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants set a common standard for the protection of human rights and may be considered a universal achievement for all peoples and all nations. However, the Constitutional Court does not uphold the assumption. In the Court's opinion, Article 10, I, of the Constitution only refers to customary international law, and, to a lesser extent, those treaties that merely repeat principles and rules whose source can be traced back to customary international law.[4]

Customary international rules (i.e. the domestic provisions which incorporate them) place themselves at an intermediate level between the Constitution and primary legislation. As a consequence, the internal sources incorporating international customary rules can be defined as 'atypical', because they enjoy a special rank vis-a-vis ordinary primary legislation (i.e., an intermediate one). If customary rules and subsequent primary legislation are inconsistent, the former repeal the latter to the extent of the inconsistency. On the contrary, primary legislation that infringes customary international law is void and can be challenged before the Constitutional Court.[5]

Furthermore, customary international law enjoys a status that is comparable to the Constitution.

The Constitutional Court has traditionally distinguished between customs that had come into force prior to the Constitution and those that had come into force after the enactment of the same Constitution. The former usually prevailed over the Constitution according to the *lex specialis rule*. Customary rules enacted after the entry into force of the Constitution could not violate the 'basic principles' of the same constitutional system.[6]

The Constitutional Court has recently stated that all customary international law must comply with the 'basic principles' of the constitutional system.[7] To this extent, the Court found that the customary rule of state immunity from foreign jurisdictions could not infringe two fundamental core features of the Constitution: the protection

[4] See CC. n. 15/1996; C.C. n. 393/2006.
[5] See CC n. 278/1992, 172/1999, 131/2001.
[6] See CC n. 48/1979.
[7] See CC n. 234/2014.

of inviolable human rights (Article 2), and access to justice (Article 24). If it were the case – and this occurred as far as tort claims related to war crimes and crimes against humanity were concerned –, the automatic incorporation of customary international law into the Italian legal order would be limited by such fundamental constitutional principles.

§3 Incorporation of International Treaties and Agreements

66. Italy adopts a dualistic approach to international law, since it conceives international and domestic law as belonging to fundamentally separate legal orders. As a consequence, international treaties are sources of international law, but do not have effect in domestic law until they are incorporate by an Act of Parliament.

Hence, international treaties require legislative action for their incorporation into the national legal system. Such incorporation needs either an Act of Parliament, which reproduces the provisions of the treaty (*legge di esecuzione*) or an Act, to which the treaty is annexed (*ordine di esecuzione* or enforcement clause). Whilst the former directly incorporates the treaty, the latter (enforcement clause) refers to the content of the annexed treaty. The enforcement clause is said to ensure a 'fixed' (or 'material' or 'upon receipt') reference to the specific provisions laid down by the international treaty.

The Act of Parliament incorporating international treaties is an ordinary statute. As a consequence, it is hierarchically inferior only to constitutional sources, and may therefore be repealed by subsequent Acts of Parliament, notwithstanding the consequences for the State within the international system as a result of the repeal.[8] However, abrogative referenda cannot be held on Acts incorporating international treaties.[9] This last assumption is held on the ground of the constitutional provision prohibiting laws authorizing the ratification of international treaties to be submitted to abrogative referenda (Article 75, II, of the Constitution).

§4 Incorporation of Lateran Pacts

67. According to Article 7, II, of the Constitution, Acts of Parliament incorporating the Lateran Pacts can be amended only by Parliament upon an agreement entered between the State and the Catholic Church. This is due to the mutual recognition of sovereignty of State and Church within their respective jurisdictions. To put it another

[8] See CC n. 14/1964 and n. 96/1982.
[9] See CC n. 16/1978 and n. 26/1982.

way, the Constitution regulates State-Church relations according to the so-called 'concordat' principle. Thus, Article 7, II of the Constitution confers upon the Acts incorporating the Lateran Pacts a force of law that is superior to that of the other Acts of Parliament. Moreover, such Acts are able to depart from constitutional provisions that do not contain 'the supreme principles of the constitutional system',[10] such as the principle of equal protection of the laws.[11]

In addition, such Acts cannot be repealed by constitutional provisions, which do not contain the 'supreme principles of the constitutional legal system'. As mentioned above, the amendment to the Pacts is an 'atypical' Act of Parliament, which must be preceded by an agreement between the State and the Catholic Church stipulated in an external legal system common to both. The Acts incorporating the Lateran Pacts have a force of law comparable to constitutional laws. In fact, the phenomenon of the 'atypical' sources consists of the separation of the form and the effectiveness of the source. As a consequence, the active force – i.e., the ability of innovation of the legal system – corresponds to a different resistance to abrogation (passive force).

§5 International Treaties Binding Primary Legislation under Article 117, I of The Constitution

68. Article 117, I of the Constitution, introduced by the constitutional act No. 3/2001, states that legislative powers shall be vested in the State and the Regions in compliance with international obligations. Article 117, I sets up an additional limit to State legislative power, since it treats international treaty obligations as hierarchically superior to statutory law.

This limitation appended to primary legislation was originally laid down in the basic laws of the 'Autonomous' Regions.[12] Nevertheless, the Constitutional Court held that all Regions were bound by international treaties and had to respect international obligations.[13]

Scholars have long debated with respect to the question, whether Article 117, I, of the Constitution also binds State legislation. On the one hand, it should be argued that this Article simply reasserts what Article 10, I states with regard to international

[10] See CC n. 30/1971.
[11] See CC n. 18/1982.
[12] Article 3, I, basic law for Sardinia; Article 2, I, basic law for Valle d'Aosta/*Vallée d'Aoste*; Article 4, I, basic law for Friuli Venezia-Giulia; Article 4, I, basic law for Trentino Alto-Adige/*Südtirol*.
[13] See CC n. 49/1963.

customary law. On the other hand, however, Article 117, I, seems to treat international treaty obligations as hierarchically superior to both national and regional statutory laws. From this it does not follow, however, that this Article incorporates monism into the Italian Constitution. This provision does not automatically incorporate any external source of law, neither domestic nor international, but merely refers to the effects of the incorporation, i.e., to the binding effects of international obligations over the national legal system, as well as the interpretation of these effects by international and supranational tribunals. Article 1, I of the Law No. 131/2003 – which implements Article 117, I of the Constitution at the legislative level – holds the same assumption, as it expressly refers to both international customary law and international agreements, i.e., to all the external sources of international obligations binding the legislative power and that the Constitution includes in the constitutional bloc.

In the opinion of the Constitutional Court, international treaties that bind primary legislation are only those consistent with the Constitution once they have been incorporated into domestic law. If the treaty matches the above-mentioned criteria, it can be incorporated into the constitutional bloc and used as a parameter for challenging the constitutional validity of primary legislation before the Constitutional Court. As a consequence, a statute held by the Constitutional Court to violate an international treaty under Article 117, I, of the Constitution lacks domestic legal force and is declared unconstitutional. Among the international treaties binding primary legislation, there is the European Convention on Human Rights.[14] The Court also attaches binding effects to the interpretation of that treaty that is delivered by the European Court on Human Rights.[15] Furtermore, the Court includes in the constitutional bloc the United Nations Convention on the Rights of the Child (CRC or UNCRC);[16] the European Convention on the Exercise of Children's Rights (Strasbourg, 25 January 1996);[17] The United Nations Convention on the Rights of Persons with Disabilities (CRPD).[18]

[14] Among others, see CC nn. 348 and 349/2007, n. 39/2008, 331 and 317/2009, 93/2010, 113/2011, 78/2012.
[15] Among others, see CC nn. 348 and 349/2007, n. 49/2015, n. 276/2016, n. 43/2017, n. 43/2018.
[16] CC n. 7/2013, n. 239/2014, and n. 92/2018.
[17] CC n. 7/2013.
[18] CC n. 2/2016.

§6 CONFLICT OF LAW RULES

69. The relations between the Italian legal system and the legal systems of foreign countries are regulated by the so-called 'conflict of law' rules (or private international law rules). These are procedural rules set forth by Law No. 218/1995, which determines the legal system and the jurisdiction applicable to a specific dispute with a foreign element (e.g., a contract to be enforced in another country). According to the conflict of law rules, Italy governs the scope of its jurisdiction[19] and detects which law is applicable for resolving the dispute.[20] Moreover, it sets the proper regulation for the recognition and enforcement of foreign judgements.

Chapter 3 European Sources

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70. European sources of law are neither external nor domestic ones. In fact, they cannot be properly considered external sources, since European law may be regarded as a *sui generis* legal system. Although European law belongs to a legal system that is external to the Italian one, it may have a direct effect on Italian domestic law according to the principles of direct applicability and direct effect. In addition, European law prevails upon internal sources, according to a principle similar to that of competence. In other words, European law is supreme over national law, and anything contained in the EU treaties supersedes domestic legal provisions.[21]

    This peculiar relationship between European and domestic laws is due to the Italian dualist position which conceives EU and domestic law as belonging to separate legal orders, although coordinated as they share personal and territorial features.[22] According to the supremacy of EU law over domestic law, the parameters of the competence of the same EU are set by the treaties upon which is based.

    Article 1.2.b of Treaty of Lisbon (2007) states that the Union shall be founded on the Treaty on European Union (TEU) and on the Treaty on the Functioning of the European Union (TFEU) and that 'The Union shall replace and succeed the European Community'.

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[19] Articles 3–5 of Law No. 218/1995.
[20] Articles 20–63 of Law No. 218/1995.
[21] CC n. 183/1973.
[22] CC n. 170/1984.

§1 THE INCORPORATION OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (FORMER EEC TREATY)

71. Upon Italy joining the then European Community, the treaties establishing the European Communities (now the TFEU), and their subsequent amendments[23] were incorporated into Italian law by national legislation.[24]

Such acts do not follow the principles that apply to the laws incorporating 'ordinary' international treaties. In fact, they cannot be repealed by an ordinary Act of Parliament. Moreover, EU treaties establish their own sources of law, which have to be subsequently enforced into the Italian legal system.

The provisions of the treaties, which establish European sources of law, have a legal force that is comparable to that of the Constitution. This is due to Article 11 of the Constitution: under conditions of equality with other states, this article allows Italy to limit its sovereignty to the extent of the creation of a legal system that ensures peace and justice among Nations.[25] Furthermore, Article 117, I, of the Constitution[26] states that Legislative powers shall be vested in the State and the Regions in compliance with constraints deriving from EU-legislation, thus explicitly acknowledging the supremacy of EU law.

However, EU treaties must comply with the 'basic principles' of the constitutional system, which cannot be infringed by EU sources of law.[27]

Under the EU Treaty, the Charter of Fundamental Rights of the European Union of 7 December 2000 (as amended on 12 December 2007) has the same legal value as the Treaties and therefore the same supremacy EU law enjoys within the Member States. The Constitutional Court has held so accordingly as well.[28]

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[23] The Merger Treaty 1965, Acts of Accession, budgetary Treaties, the Single European Act 1986, the Treaty on European Union 1992, the Treaty of Amsterdam 1997, the Treaty of Nice 2000, and the Treaty of Lisbon 2007.
[24] Laws n. 766/1952, n. 1203/ 1957, n. 454/1992, n. 209/1998, n. 102/2002, n. 130/2008.
[25] See CC n. 227/2010.
[26] As amended by constitutional act No. 3/2001.
[27] CC n. 183/1973, and n. 170/1984. See also ECJ 05-12-2015 C n. 42/17.
[28] See CC n. 80/2011, n. 236/2016, and 269/2017.

§2 THE RECEPTION OF EUROPEAN LAW

72. EU primary legislation comprises the treaties incorporated by Parliament. European secondary legislation is passed by EU institutions under Article 161 EURATOM Treaty and Article 288 EU Treaty.

    Secondary legislation comprises 'regulations', 'directives' and 'decisions.' Article 288 of the TFEU define these terms as follows:

    'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.

    'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

    'A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them'.

§3 EU REGULATIONS

73. Article 11 of the Constitution has created a 'legislative automatism', which allows European regulations to supersede internal sources. This means that immediately upon its enactment, a regulation operates within Italian law, as if its own legislature had produced the measure and to the exclusion of domestic law. They are enforceable from the time of their creation and States do not have to pass any further legislation. This 'legislative automatism' inhibits the decisional power of the domestic source; as a consequence, domestic rules inconsistent with EU regulations become legally irrelevant.

    The relations between EU regulations and domestic statutes do not follow the criteria that govern antinomies between internal sources. The Constitutional Court played a pivotal role in shaping the relations between domestic law and European sources. The Italian Constitutional Court originally applied the chronological criterion, privileging the *lex posterior*.[29] However, this thwarted the supremacy of European law. In a subsequent judgement, the Constitutional Court held that it was necessary to challenge the constitutional validity of Italian legislative provisions inconsistent

[29] CC n. 14/1964.

with European regulations.[30] In so doing, the Constitutional Court was able to take under its control a source of legislation of an external system. The European Court of Justice harshly criticised this case law. Finally, the Constitutional Court configured the conflict between domestic laws and regulations as a 'direct violation' of European law.[31] The Constitutional Court has eventually stated that regulations take precedence over previous and subsequent domestic legislation. Moreover, national courts must set aside domestic legislation inconsistent with European regulations and must apply the latter in their entirety. However, the Constitutional Court has the possibility to set aside national and regional legislation challenged in accordance with Article 127 of the Constitution, which sets the jurisdiction of the Constitutional Court over legislative disputes between State and regions.[32] This is also due to Article 117, I, of the Constitution: as already said, it treats EU sources of law as hierarchically superior to both national and regional statutory law.

Nevertheless, it should be recalled that EU regulations enjoy a status that is comparable to the Constitution. However, they must respect the 'basic principles' of the constitutional system. If the EU regulations infringe the fundamental core features of the Constitution, the Constitutional Court may set aside the acts incorporating EU treaties to the extension of the inconsistency.[33]

§4 EU DIRECTIVES

74. EU directives bind only Member States, leaving no discretion as to their objectives. They state general goals and leave the precise implementation in the appropriate form to the individual Member States. As a consequence, some domestic legislative action is required for their implementation; legislation enacted in order to implement directives has a legal force that is superior to that of ordinary Acts of Parliament, since it can repeal previous laws and determine the invalidity of subsequent ones. It is then an 'atypical' source, which is not even subject to abrogative referenda. This is due to Article 117, I of the Constitution, which binds State and regional legislation to respect EU constraints and calls for compliance with EU law.[34]

Some directives lay down obligations which are sufficiently clear and complete so that they are not subject to any exception and condition, and do not require

[30] CC n. 232/1975.
[31] CC n. 170/1984.
[32] CC n. 384/1994, 94/1995, 102/2008; n. 66/2013, n. 171/2013; n. 269/2014; n. 38/2015.
[33] CC n. 170/1984.
[34] Among others, see CC n. 406/2005, n. 126/2006, n. 28/2010, n. 18/2012.

intervention on the part of Member States. These directives have direct effect: individuals may rely on EU law in any action against the government without the need for their particular State to have passed the law within its own legal system. Therefore, they confer enforceable individual rights, and impose obligations upon individuals. Both the European Court of Justice and the Italian Constitutional Court have expressly acknowledged this,[35] and held that directives can have a direct effect only between State and individuals.[36]

§5 The Annual Acts of Parliament Setting the Proper Measures for Ensuring the Fulfillment of EU Obligations

75. Law No. 234/2012 provides the legislative action required at the national level for implementing EU law. The statute provides us with two forms of legislative action for the precise implementation of EU law. These are the so-called '*legge europea'*, and the so-called *'legge di delegazione europea'*, i.e., annual Acts of Parliament, which set forth the proper measures for ensuring the fulfilment of EU Obligations.[37] Under this Act, Parliament directly incorporates and implements directives and ECJ judgements and repeals primary legislation inconsistent therewith. In addition, Parliament can have recourse to both primary and subordinate delegated legislation.[38]

    Moreover, Law No. 234/2012 implements Article 117, V of the Constitution on the participation of Regions in the European decision-making process. Regions are enabled to incorporate EU directives in their fields of legislation in observance of procedures set forth by State law.[39] In addition, an Act of Parliament sets the proper measures for the State to act in substitution of the regions if the latter do not fulfil EU obligations. Like the State, several Regions approve an annual act, which establishes the proper measures for ensuring the fulfilment of EU obligations.[40]

    State and regional Acts setting proper measures for ensuring the fulfilment of EU law have the same force and effect as the single act implementing EU directives.[41]

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[35] ECJ 5-2-1963 C n. 26/1962; CC n. 182/1976.
[36] Horizontal effect of EU law: ECJ 26-2-1986 C n. 152/1984
[37] Articles 29 ff Law No. 234/2012.
[38] Article 35 Law No. 234/2012.
[39] Article 40 Law No. 234/2012.
[40] CC n. 63/2012.
[41] Article 34 Law No. 234/2012.

Chapter 4 Domestic Sources

by Maurizio Pedrazza Gorlero – Matteo Nicolini

§1 THE CONSTITUTION

76. The Constitution is the fundamental law of Italy and provides the Republic with a comprehensive legal framework. It is hierarchically superior to all the domestic sources, the validity and force of which depend upon whether they are enacted according to the same Constitution. Furthermore, the Italian Constitution is 'entrenched' or 'rigid': it sets forth the rules presiding the legislative process that has to be followed when it comes to amending its provisions. It also prevents the same provisions from being amended without respecting the constitutional amending formula enshrined in Article 138 of the Constitution. Procedures for constitutional amendments are thus more burdensome than those envisaged for ordinary laws.

Some constitutional provisions cannot be amended or replaced: for example, Article 139 states that 'The form of Republic shall not be a matter for constitutional amendment.' The 'form of the Republic' refers not only to the periodical election of the Head of State,[42] but also to the pluralism which underpins the concept of constitutional democracy. Thus, it encompasses popular sovereignty, local and regional autonomy, the election of political representatives, freedom of thought, association, vote, and so on.[43] Moreover, the rigidity of the Constitution puts constraints on both the constitutional and the ordinary legislators, and presupposes the judicial review of legislation.[44] The Constitutional Court has indeed adhered to the doctrine of unconstitutional constitutional amendments: these are deemed to be unconstitutional if they infringe the basic features of the Constitution, such as 'inviolable rights' and 'supreme principles of the constitutional system'.[45]

Constitutional core principles are hierarchically superior to any other source of law. It is called the 'super' or 'nuclear' Constitution, which comprises those constitutional provisions, which set the procedural and substantive limitation – explicit or implied – to constitutional amendments.

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[42] Articles 83 and 85 of the Constitution.
[43] Articles 1, 5, 56, 57, 21, 18, and 48 of the Constitution.
[44] Articles 1, 5, 56, 57, 21, 18, and 48 of the Constitution.
[45] CC n. 1146/1988.

§2 CONSTITUTIONAL LAWS

77. Article 138 of the Constitution sets forth a unitary legislative process for passing constitutional amendments and constitutional laws. Whereas constitutional amendments alter the text of the Constitution, the latter have a constitutional status but are not formally incorporated into the same Constitution. It is not easy to draw a divide between constitutional amendments and constitutional laws: they share common features and their fields of competence frequently overlap.

    Constitutional laws are set at the apex of the legal system. They can amend every constitutional provision with the exception of the 'fundamental features' of the Constitution. Constitutional laws cannot be submitted to abrogative referenda, since their amendment and repeal is envisaged provided it is set forth in Article 138 of the Constitution.

    There are also atypical acts at the constitutional level. These are: a) the constitutional laws that alter the territory of the Regions; b) the constitutional laws which adopt the basic laws of the 'special' Regions.

I Constitutional Laws Providing the Territorial Alteration of the Regions

78. Article 132, I, of the Constitution requires a constitutional act in order to create new regions, merge existing ones, incorporate a region into another one. The provision requires that new regions must be 'vital', as they must have a minimum of one million inhabitants.[46]

    The procedure laid down in the provision is extremely complex: a) the request for territorial alteration must be called for by a number of Municipal Councils representing not less than one-third of the populations concerned in the territorial regrouping; b) the population must consent to the alteration through referendum; c) Parliament approves the constitutional law; d) existing regions may express their views on the proposed territorial alteration.

    Thus, the Constitution provides a legislative process for creating constituent units. The process has recourse to a *referendum*, through which the regional population decides its own 'self-identification' as a regional community. As a consequence, alterations cannot be unilaterally approved by Parliament: it can only ascertain, *upon a political basis*, whether the criteria enabling territorial alteration are consistent

[46] CC n. 278/2011.

with Article 5 of the Constitution. If it were the case, Parliament may trigger the proposed alteration and therefore demarcate the self-determined new Region.

II Constitutional Laws Adopting the Basic Laws of 'Autonomous' Regions

79. Article 131 of the Constitution establishes twenty regions, five of which (Trentino-Alto Adige/*Südtirol*, Friuli-Venezia Giulia, Aosta Valley/*Vallée d'Aoste*, Sicily, and Sardinia) are denominated 'autonomous' regions.[47] Autonomous regions enjoy a higher degree of self-regulation and their competences are enumerated in their own 'basic laws' (*statuti*), which are approved by Parliament as acts at the constitutional level. As the institution of autonomous Regions corresponds to ethnic and geographical reasons, this type of constitutional laws has a specific object, a specific *nomen juris*: they are indeed denominated *statuti speciali*, i.e. special basic laws. Furthermore, they have a limited territorial jurisdiction: their territorial scope coincides with the regional territory. They are constitutional laws, which are not incorporated into the constitutional text. However, they complement constitutional provisions in order to provide autonomous regions with 'special forms and conditions of autonomy'. They have, then, a special status, since they cannot amend all the constitutional provisions, but only those falling within their specific field of competence, i.e. the regulation of special regional autonomy.

Constitutional laws adopting the basic laws of 'Autonomous' Regions are usually amended by subsequent constitutional acts. In some cases, however, they can be altered by regional laws. The constitutional amendment act n. 2/2001 grants autonomous Regions the ability to set their own form of government and electoral system: the act is approved by absolute majority of the members of the regional legislature. The Constitutional Court holds that such an act is an expression of regional constitutional autonomy.[48] According to the constitutional amendment act n. 2/2001, the constitutional laws adopting the basic laws of 'Autonomous' Regions cannot be submitted to confirmative *referendum* under Article 138, II, of the Constitution.

Moreover, the provisions concerning intergovernmental fiscal relations set forth in the special basic laws can be amended by passing either a constitutional act or an ordinary law of the State, provided that the latter is precede by an agreement

[47] Article 116, I, of the Constitution.
[48] CC n. 370/2006.

between the State and the Region concerned.[49] The Acts of Parliament based on a State-Region agreement count as constitutional amendments.[50] The same procedure applies when it comes to amending the governmental system of the 'Autonomous' Regions, by introducing, for example, the direct election of the regional presidents or the speaker of the regional legislature.

Finally, article 10 of the constitutional amendment act n. 3/2001 provides a transitional provision: as long as Parliament does not amend the basic law of the special regions, it is possible to extend to them the broader forms of legislative and administrative autonomy that ordinary Regions enjoy under Title V of the Constitution.[51]

§3 PRIMARY LEGISLATION

I Acts of Parliament (or 'Formal' Laws)

81. Parliament passes primary legislation according to Articles 70 ff. of the Constitution. The pieces of primary legislation are also called 'formal' laws: the phenomenon of the 'typical' sources indeed consists of the connection of the form (primary legislation) and the effectiveness of the source (i.e. the force of law).

II Laws Granting Amnesty and Pardon

82. 'Amnesty' and 'pardon' are acts of collective mercy whereby crimes are wiped out and sentences commutated, remitted or reduced. Pursuant to Article 79, II, of the Constitution, they are granted by an Act of Parliament, which has to be passed by two-thirds of the members of both Houses voting on each single article and on the statute as a whole. The act therefore requires the approval of both the 'majority' and the 'opposition', that is to say, the two subjects of parliamentary democracy.

Due to the entrenched legislative process required for their approval, laws granting amnesty and pardon have a force of law which is superior to that required by the nature of the effect it produces, i.e., the 'temporary suspension' of the effectiveness of criminal law. Moreover, they cannot be repealed by an ordinary act of Parliament. If Parliament repealed an act granting pardon and amnesty, it would infringe the

[49] Article 54, IV, basic law for Sardinia; Article 50, V, basic law for Valle d'Aosta/*Vallée d'Aoste*; Article 63, V, basic law for Friuli-Venezia Giulia; Article 104, I, basic law for Trentino Alto-Adige/*Südtirol*.
[50] CC n. 99/2014, n. 46, 77, 82/2015, and n. 28/2016.
[51] CC n. 377/2002 and 408/2002; CC n. 255/2014.

Constitution. Laws granting pardon and amnesty cannot be submitted to abrogative referenda.[52]

III The So-Called 'Atypical' Laws

83. We have already examined 'atypical' legislation. Atypical acts of Parliament are usually the outcome of a legislative process which incorporates additional procedural stages within the parliamentary procedure. Such variation in the parliamentary procedure entrenches atypical laws: their force sets them in an intermediate position between the Constitution and ordinary legislation. As a consequence, they cannot be amended nor repealed by 'ordinary' primary legislation.

The Constitution lays down several 'atypical' laws.

Firstly, there are the laws incorporating the Lateran Pacts and their subsequent amendments, which we have examined above.[53]

Secondly, an Act of Parliament may separate provinces and municipalities from a Region and aggregate them to another one.[54] A referendum must be held in order to acquire the consent of the population of the sole municipalities and provinces concerned.[55] Once the population of the provinces and municipalities concerned has approved the referendum, the Parliament can pass the act for territorial readjustment.[56] As far as special Regions are concerned, changes in their territorial identity – even the minor ones – require a constitutional amendment.[57] This is due to the fact that their basic laws, which were passed as acts at the constitutional level, have undoubtedly entrenched their territory.[58] Despite this, in 2017 Parliament separated the municipality of Sappada/*Plödn* from the Veneto Region and

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[52] Article 75, II, of the Constitution.
[53] Article 7, II, of the Constitution. See above, Part I, Chapter 2, § 4.
[54] Article 132, II, of the Constitution.
[55] CC n. 334/2004.
[56] See Article 132, II, of the Constitution. For an application see Law n. 117/2009, which separated the municipalities of the Vamarecchia Valley (Casteldelci, Maiolo, Novafeltria, Pennabilli, San Leo, Sant'Agata Feltria e Talamello) from the Marche region and aggregated them to the Emilia-Romagna region.
[57] CC n. 66/2007.
[58] The regional territory is expressly demarcated by Article 1 basic law for Sardinia; Article 1, basic law for Sicily; Article 1, II, basic law for Valle d'Aosta/*Vallée d'Aoste*; Article 1, 1, basic law for Friuli Venezia-Giulia (amended by constitutional law n. 172016); Article 3, basic law for Trentino Alto-Adige/*Südtirol*.

aggregated it to the Friuli-Venezia Giulia Region by passing a piece of ordinary legislation.[59]

Thirdly, Parliament approves the laws incorporating the agreements between the State and non-Catholic religious denominations.[60] Parliament, however, is not compelled to incorporate the agreement; but if it decides to do so, it cannot amend the text of the agreement.[61]

Fourthly, Article 116, III of the Constitution[62] regulates another 'atypical' law. The constitutional provision establishes a legislative process whereby additional forms and conditions of autonomy are granted to ordinary Regions upon their initiative. The State and the Region concerned must enter into an agreement, which is subsequently passed by both Houses with an absolute majority of their members. The proposed additional special forms and conditions of autonomy are only those indicated in a specific list of concurrent and State exclusive legislative powers. The act must comply with the principles on State-Regions financial relations set forth in Article 119 of the Constitution, after consultation with local authorities.

Fifthly, an Act of Parliament may alter provincial boundaries and create new Provinces within a Region.[63] In the opinion of the Constitutional Court, the act does not require a referendum to be held, but only the advice of the councils of the municipalities concerned.[64]

Finally, the constitution amendment act n. 1/2012 amended Article 81 of the Constitution and introduced a new atypical law, in accordance with the 'Treaty on Stability, Coordination and Governance in the economic and monetary union' (TSCG), signed in Brussels on 2 February 2010, and incorporated into the Italian legal system.[65] The atypical law on budgetary parliamentary procedure is an Act of Parliament passed by both Houses with an absolute majority.[66] The Act must comply

[59] See law n. 182/2017.
[60] Article 8, III, of the Constitution.
[61] See CC n. 52/2016.
[62] Introduced by the constitutional (amendment) act n. 3/2001.
[63] Article 133, I, of the Constitution.
[64] CC n. 230/2001.
[65] See law n. 114/2012.
[66] See law n. 243/2012, as amended by law n. 164/2016.

with the principles related to the balance between revenues and expenditures which are set forth in Article 5 of the constitutional amendment act n. 1/2012.[67]

§4 EXECUTIVE ORDERS AT LEGISLATIVE LEVEL

I Decree-Laws

84. Pursuant to Article 77 of the Constitution, Decree Laws are provisional measures with force of law. The Cabinet[68] is allowed to enact them in extraordinary cases of necessity and urgency; upon the same day of their enactment, the Cabinet has to table them before the Houses of Parliament for their ratification. Decree-Laws must be ratified (i.e. turned into an Act of Parliament) within 60 days of their publication in the Official Gazette. Otherwise the decrees lose effect from their inception. The Houses of Parliament, even if dissolved, shall be specially summoned and shall assemble within five days of the presentation of the decree. The Houses can either ratify or reject the turning into law of the decree. However, Parliament may regulate rights and obligations arising out of non-ratified decree-laws by passing an ad-hoc piece of legislation.[69]

85. Decree-laws may regulate all the fields reserved to primary legislation. Limitations to the enactment of the emergency decrees of the government can be inferred from the Constitution. Firstly, decree-laws may not be used where a field of legislation implies ministerial responsibility: these fields are reserved to parliamentary legislation. We can mention primary-delegated legislation, approval of budgets, Acts authorising the President of the Republic to ratify international treaties. Secondly, decree-laws may not be enacted for regulating and sanctioning rights and obligations arising out of non-confirmed law-decrees. Thirdly, they cannot reproduce the content of a non-confirmed law-decree. Finally, the content of the law-decree does not have to be different from that which appears in the title.

    Article 15 of Law No. 400/1988 contemplates all these hypotheses and therefore implements the constitutional provisions. In addition, the article states that decree-laws cannot restore the effectiveness of provisions set aside by the Constitutional Court. This provision applies to ordinary laws and regional laws as well.[70] It then introduces additional restrictions to the enactment of law-decrees, which cannot be

[67] Article 81, VI, of the Constitution. See CC n. 235/2017.
[68] I.e., the Council of Ministers: see Article 92, I of the Constitution.
[69] See Part II, Chapter 4.
[70] CC n. 350/2010.

traced back to constitutional provisions. For example, a decree law cannot be enacted as far as electoral matters are concerned. Nevertheless, the Constitutional Court acknowledged the possibility of enacting a law-decree in the electoral field.[71]

The Cabinet ought to have recourse to law-decrees provided that there are extraordinary cases of 'necessity' and 'urgency'.[72] These are referred to the current legislative situation, and not to the legislative situation that will occur in the future.[73] The effectiveness of decree-laws is limited in time and is destined to fail if the decree is not confirmed within 60 days of their publication. In order to avoid the loss of effect of the decree, the government has fostered the practice of 'reiterating' the decree-laws. This practice may be considered legitimate as long as the necessity and the urgency – which are the rationale of the enactment of such decree – still continue. On the contrary, the Constitutional Court holds that the reiteration of decree-laws is inconsistent with the Constitution. In fact, decree-laws can be reiterated providing that they are based on new extraordinary cases of necessity and urgency, which justify their adoption.[74]

86. Parliament ratifies decrees-law by enacting a particular piece of legislation, i.e. the so-called *legge di conversione*. The Standing Orders of both Houses[75] and Article 15, V, of Law No. 400/1988 also allow a partial ratification of the decree, as well as the possibility of amending its provisions. After ratification, the Act of Parliament becomes the source of the rules that were previously set forth by the decree. According to the Constitutional Court, the ratification of the law-decree cannot validate substantial and procedural flaws of the decree law. This means that, if the decree is inconsistent with the constitutional requirements upholding its enactment (extraordinary cases of 'necessity' and 'urgency'), the decree law is unconstitutional and must be set aside.[76] In a recent judgment, the Constitutional Court held that Parliament cannot amend the law-decree by inserting into it provisions which are not 'homogeneous' to those contained in the law-decree as enacted by the Government.[77]

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[71] CC n. 161/1995.
[72] CC n. 29/1995.
[73] Article 15.3 of Law No. 400/1988). On the practice concerning the application of these constitutional rules see: Part II, Chapter 4.
[74] CC n. 360/1996.
[75] Article 78 Senate Rule of Orders; Article 96*bis* Chamber of Deputies Rules of Orders.
[76] CC n. 171/2007 and 128/2008.
[77] CC n. 22/2012.

Finally, the Government cannot resort to decree laws when passing broad changes in the legal system. When the Government tried to change the territorial reconfiguration of provincial boundaries by decree law, the Constitutional Court held that such reform was unconstitutional.[78]

II Legislative Decrees

87. The Houses of Parliament may delegate the exercise of legislative powers to the Cabinet.[79] Parliament, however, must specify principles and criteria of guidance, and delegate the legislative power only for limited time and well-specified subjects.

The legislative decree concurs with the ordinary Acts of Parliament. Antinomies between Acts of Parliament and decree-laws are solved in accordance with the chronological criterion.

88. The Act that delegates legislative powers to the Cabinet ('enabling act') is a statute enacted by Parliament.[80] Legislative delegation can deal with any field of legislation. Limitations to the enactment of legislative decrees can be inferred from the Constitution. A decree may not be used where a field of legislation implies ministerial responsibility. We can mention the approval of budgets and financial records, the ratification of decree-laws, and so on.[81] Fields of legislation reserved to assembly approval are not excluded from delegation, since there is no significant connection between the phenomenon of delegation and that of the assembly reserve.

Delegation is assigned to Cabinet for a limited period of time. The Constitutional Court censured the practice of delaying the publication of the enabling act, in order to draw advantage from a period of time that is longer than that provided in the enabling Act.[82] Delegated legislation must comply with the principles and the criteria set forth in the enabling act: these are usually related to the field to which the delegated legislation refers, and comprise all the rules that are instrumental to the purposes of the delegation.[83]

89. The validity and the effectiveness of the legislative decree depends on the observance of the limits set forth by the act. The enabling Act may contain both

[78] CC n. 220/2013.
[79] Articles 76 and 77, I, of the Constitution.
[80] Article 72, IV, of the Constitution.
[81] Article 72, IV, of the Constitution.
[82] CC n. 163/1963.
[83] See Part II, Chapter 4.

constitutional and additional limits.[84] The justification of these additional limits can be traced back to the fact that delegated legislative power is inherently limited.

Legislative decrees, which do not comply with the principles set forth in the enabling act, are inconsistent with the enabling act and therefore indirectly violate the Constitution.[85]

III 'Atypical' Delegation of Legislative Powers: Legislative Decrees in the Event of War

90. The President of the Republic declares war upon authorisation of Parliament,[86] which has the authority to declare a state of war and vests the necessary powers in the Cabinet. It has been disputed whether the conferral of necessary powers to the Cabinet is a type of legislative delegation.[87] It should be argued, however, that the assignment to the Cabinet of the necessary powers implies the assignment of legislative powers and can only be carried out through an Act of Parliament according to the paradigm of legislative delegation. This kind of delegated legislation constitutes 'atypical' delegation, because all the limitations for ordinary delegation (principles, guiding criteria, limited time, specified ends) are lacking.

IV Legislative Decrees Implementing the Basic Laws of 'Autonomous' Regions

91. The legislative decrees implementing basic laws of 'Autonomous Regions' are laid down in the constitutional laws adopting the basic laws of the same autonomous regions.[88] Through such legislative decrees, the regional basic laws allow the government to transfer the offices and government staff to the Autonomous Regions, and to implement, integrate, and specify basic law provisions. Whereas the object, the governing criteria, and principles can be implicitly derived from the regional basic laws, there is indication of a limited time for their enactment. Where appended, the temporal limit has been widely eluded.[89] The temporal limit configures the delegation for the implementation of the special basic laws as a continuous delegation, which can be carried out by several acts. This tends to configure such delegation as an

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[84] See Part II, Chapter 4.
[85] CC n. 3/1957; n. 104/2017.
[86] Article 87 of the Constitution.
[87] Article 78 of the Constitution.
[88] Article 43 basic law for Sicily; Article 56 basic law for Sardinia, Article 107 basic law for Trentino-Alto Adige/*Südtirol*; Article 65 basic law for Friuli-Venezia Giulia; Article 48*bis* basic law for Valle d'Aosta/*Vallée d'Aoste*,
[89] Article 108, I, basic law for Trentino-Alto Adige/*Südtirol*.

'atypical' one. Moreover, this type of delegation is 'atypical' because the delegation itself derives from a provision at the constitutional level to the exclusion of the acts of Parliament.[90]

The procedure whereby the decrees are enacted provides for an advisory opinion or a proposal on the outline of the decree which formulated by State-Regions joint committees. The participation of joint committees in the drafting of the decrees set them among the 'atypical' sources.

V Legislative Decrees Setting Consolidated Legislation

92. Consolidated Acts are legislative decrees. They represent a restatement of primary legislation scattered over several statutes. Consolidated Acts enable previous primary legislation to be repealed. In order to approve Consolidated Acts, Parliament must delegate the necessary legislative powers to the Government. The limits of time, object, guiding criteria, and specific limited time can be implicitly derived from the function carried out by consolidated legislation.

In some cases, Consolidated Acts cannot introduce any change in the law: the Act is a mere consolidation of all the law on a particular matter within one legislative decree (*testi unici compilativi*).[91] The Cabinet – which normally enacts the consolidated Act upon parliamentary delegation – cannot amend the legislation in force.[92]

§5 The Outcome of Abrogative Referenda as a Source of Law

93. Pursuant to Article 75, I, of the Constitution, the outcome of an abrogative referendum – i.e. the deliberation of the electoral body that totally or partially repeals a piece of primary legislation – enjoys a status comparable to that of primary legislation.

Firstly, the repeal of a piece of legislation triggers changes in the legal system, and therefore renovates the legal system itself. Secondly, referendum promoters may also call for a partial repeal of legislation through referendum: partial repeals are aimed at carving a new law out of the text of the existing one in order to being submitted to the approval of the electoral body. This gives rise to a kind of *lex rogata* or popular law.

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[90] CC n. 316/2004.
[91] See Article 17*bis*, II of Law No. 400/1988.
[92] CC n. 80 and 162/2012.

§6 OTHER SOURCES OF LAW AT LEGISLATIVE LEVEL

94. The Standing Orders of Parliament, as well as the regulations and rules of procedure before the Constitutional Court should be considered primary legislation. Indeed, they are subordinate only to constitutional sources. The criterion applicable to conflicts between such sources of law and primary legislation is that of competence.

I Parliamentary Standing Orders

95. Article 64, I, of the Constitution establishes that 'Each House adopts its own rules by absolute majority of its members'. Article 72, I, II, III, of the Constitution then states that the Houses of Parliament can set rules establishing shortened procedures for urgent draft legislation. In addition, standing orders set the ways in which the workings of committees are made public, the procedures for the consideration of bills.

According to the criterion of competence, matters reserved to parliamentary standing of orders cannot be regulated by statutory law, but only by sources at the constitutional level. Conflicts between parliamentary standing orders and constitutional provisions can arise autonomously or may derive from an Act of Parliament approved in accordance with an invalid Standing Order. In both cases, the Constitutional Court held that Standing Orders are *interna corporis acta* and therefore their constitutional validity is unchallengeable. In this respect, the Constitutional Court ruled that parliamentary Standing Orders could not be subject to judicial review of legislation, since they do not have binding force of law.[93] As regards laws conflicting with invalid Orders, the Act of Parliament approved in accordance with them should be inconsistent with the Constitution as well. However, the Constitutional Court held that the principle that prevents *interna corporis* from being challenged before the Constitutional Court is to be set aside only when the standing orders directly infringe the Constitution.[94]

II Regulations and Rules of Procedure before the Constitutional Court

96. The regulations of the Constitutional Court are provided in Article 14 of Law No. 87/1953, i.e. in an ordinary act of Parliament, which implements the constitutional provisions concerning the Constitutional Court. These regulations govern the organisation and functioning of Constitutional Court. Additional rules of procedure

[93] CC n. 154/1985; n. 120/2014.
[94] CC n. 9/1959.

can be set therein.[95] They are approved by the majority of members of the Court and published in the Official Gazette.

As mentioned above, such regulations are set forth by an ordinary Act of Parliament. However, they can be considered as primary legislation. Indeed, the Court enacts them in the exercise of its legislative power, which can be directly traced back to the Constitution. In this respect, the regulations and the rules of procedure to be an expression of the constitutional independence of the constitutional adjudicator. As a consequence, Law No. 87/1953 does not create a new source of law, but simply acknowledges a regulatory power directly granted by the Constitution.

In addition, limitations to the principle of constitutional autonomy of the Court operate either directly or through an act of primary legislation. In other words, the organisation and functioning of the Court is carried out by an overlapping jurisdiction, in which both primary legislation and regulations concur. Where primary legislation and regulation are inconsistent, it is the act of Parliament, which prevails. To sum up, the rule that has been adopted is the doctrine of the paramountcy of primary legislation. The Constitutional Court holds that the validity of both the regulations and the rules of procedure are unchallengeable before the Court itself.[96]

§7 SECONDARY SOURCES

97. Secondary legislation is hierarchically subordinate to primary legislation. It mainly consists of regulations enacted by the executive, which are listed in Article 17, I and II of Law No. 400/1988. The list is not exhaustive: the law, which is the foundation of subordinate legislation, allows new types of regulations to be set up. It should be recalled that Article 117, VI of the Constitution sets the distribution of subordinate legislative powers between the State and Regions. Whereas the State can enact regulations within the fields of its exclusive legislative jurisdiction – insofar as it does not devolve such power to the Regions – the power to issue by-laws is vested in the regions in any other matters.

[95] Article 22, II, of Law No. 87/1953.
[96] CC n. 295/2006.

I Executive Regulations: Rules and Regulations Supplementing Primary Legislation

98. This type of regulations governs 'the implementation of laws and legislative decrees and EU regulations',[97] as well as 'the implementation and integration of laws and legislative decrees, in which fundamental principles are laid down, with the exclusion of those principles relating to subject matter reserved for regional competence.'[98]

Rules and regulations supplementing primary legislation represent the paradigm of 'subordinate' or 'secondary legislation'. The extension of this concept ranges from supplementing legislation in the strict sense (as a specification of the legislative rules) to the implementation and integration of principles set forth in legislative provisions.

II 'Independent' Regulations

99. Independent regulations govern 'subject matters where there is no regulation set by acts with force of law at legislative level, provided that they do not refer to subject matters which are in any case reserved for law.'[99]

Independent regulations differ from those regulations which implement and integrate laws. In fact, whereas the ambit of operation of the latter is covered by fundamental principles set by an Act of Parliament, independent regulations provide even in the absence of law. The lack of law must nevertheless be interpreted both as an absence of an explicit legislative regulation assigning statutory power and as a presence of an implicit rule conferring such power.

III Regulations Organising Public Administration

100. Regulations governing the 'organisation and functioning of public administration according to the provisions dictated by laws'[100] are enacted according to Article 97, I of the Constitution: 'Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration. The regulations of the offices establish the areas of competence, the duties and the responsibilities of the officials.'

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[97] Article 17.1.a of Law No. 400/1988.
[98] Article 17.1.b of Law No. 400/1988.
[99] Article 17.1.c of Law No. 400/1988.
[100] Article 17.1.d of Law No. 400/1988.

The organisational regulations represent a unique model, since they implement primary legislation according to constitutional principles. These regulations supplement the provisions of legislative provisions setting fundamental principles.

IV 'Authorised' Regulations

101. 'Authorised' regulations replace primary legislation under an enabling act such as that of Parliament. In other words, they can deregulate entire legislative ambits by replacing them with statutory ones, provided that the subject matter is not entirely reserved to primary legislation. According to Article 17, II, of Law No. 400/1988, the enabling act repeals the provisions at the legislative level. If the act did not foresee the repeal of legislative provisions, it would be inconsistent with the Constitution, since it cannot establish a source in competition with itself. The justifications for 'authorised' regulations can hold good provided that the powers granted are precise and clear, and conferred on an identifiable field. The repeal of legislative provisions will become effective when 'authorised' regulation comes into force. Some objections have been made to the enactment of 'authorised' regulations. However, it is not the 'authorised' regulation which repeals primary legislation, but the act conferring the delegated powers. On the contrary, the 'authorised' regulation would repeal an act, which is hierarchically superior to the regulation itself. Moreover, the act repealing legislative norms previously in force also sets forth 'the general rules regulating the subject matter'. As a consequence, the subject matter itself will be regulated both by the ordinary act (which sets forth the fundamental principles) and by the regulation (which sets forth the specific and detailed provisions).

    Article 17, IV*bis* of Law No. 400/1988 explicitly reserves to 'delegated' regulations the possibility to set forth the provisions regarding the organisation and functioning of Ministry departments and offices. In addition, the Cabinet must have recourse to 'delegated' regulations for replacing legislative provisions concerning administrative proceedings.[101]

V Regulations Implementing European Directives

102. Regulations implementing EU Directives are 'authorised' regulations, which replace primary legislation under the authority conferred by annual acts of Parliament setting the proper measures for ensuring the fulfilment of EU obligations. By withdrawing primary legislation and replacing it with statutory instruments, these regulations

[101] See Article 20, II of Law No. 59/1997, as amended by Article 1 of Law No. 246/2005 and Article 4 of Law No. 69/2009),

deregulate entire ambits which were once regulated by acts of Parliament. Regulations implementing EU Directives cannot be enacted when it comes to either establishing new administrative organs and structures or setting new expenses or levying less revenue. The annual act of Parliament setting the proper measures for ensuring the fulfilment of EU obligations directly implements EU directives setting new criminal indictments and administrative fines. The act identifies public authorities to which administrative functions related to EU law are to be assigned.[102] The Cabinet can adopt such regulations to act in substitution when Regions do not fulfil EU obligations.[103]

VI 'Consolidated' Regulations

103. Article 17, IV*ter* of Law No. 400/1988[104] allows the Cabinet to consolidate subordinate legislation, which is scattered over several acts. 'Consolidated' regulations cannot introduce any change in the law: they are mere consolidation of all the provisions enacted at a level inferior to primary legislation.

VII Ministerial and Inter-ministerial Regulations

104. Parliament can expressly allow one or more ministers to enact statutory instruments in the form of rules and regulations for supplementing the provision of an Act of Parliament itself.[105] Through statutory instruments ministers are then allowed to introduce regulations that have to be consistent with powers delegated to them by Parliament in enabling legislation. Ministerial and Inter-ministerial Regulations must conform both to primary and executive subordinate legislation. As they are hierarchically subordinate to both primary and secondary legislation, they are ranked as third-level sources.

§8 SOURCES OF TERRITORIAL AUTONOMY

105. Italy is characterised by a polyarchy of political decision- and law-making entities, coordinated by the national order of government. This can be considered as a communitarian perspective of the State, useful when it comes to matching the needs of politico-institutional pluralism. The 'State-as-a-community' perspective obliterates the concept of sovereignty, and replaces it with a new one, which corresponds to the

[102] Article 34 of Law No. 234/2012.
[103] Article 35 of Law No. 234/2012.
[104] Introduced by Article 5, I, of Law No. 69/2009.
[105] Article 17, III of Law No. 400/1988.

relationships between Nation-State sovereignty (for the purpose of unification and inter-subjective coordination) and autonomy (i.e., the power of the subjects of pluralism to self-organise and self-regulate).

Regional and local autonomy impacts on legislative law-making. In this respect, autonomy entails the constitutional distribution of legislative power between the national authority and sub-national authorities. As a consequence, subnational units have the capability of enacting acts and regulations that are part of the legal system. 'Autonomous' sources include regional and local sources. It should be recalled that both systems of sources have been profoundly modified by three constitutional amendments, which radically changed the constitutional design as regards intergovernmental relations (between the State, the Regions and, to a lesser extent, the municipalities), regional and local sources of law, and the structure of government within the Regions.[106]

I Sources of Law at Regional Level

106. Legislation at the regional level comprises regional basic laws, regional laws, and regional regulations.[107] Abrogative referenda can be held 'on the laws and administrative measures of the Region' and therefore on regional regulations. Abrogative referenda on regional laws and regulations are set at the primary or subordinate legislation level accordingly.[108]

II Basic Laws of the 'Ordinary' Regions

107. 'Ordinary' Regions are allowed to enact their own basic laws by passing an act at the legislative level. Basic laws must determine the frame of government and the fundamental principles of organisation and functioning of the Region in accordance with the Constitution. In addition, they define how to table bills before regional legislatures and how to hold abrogative referenda on regional laws and administrative decisions. Furthermore, they regulate the forms of publication of regional laws and regulations.[109] Finally, basic laws regulate the 'council of local

[106] Constitutional amendment acts No. 1/1999, no. 2 and 3/2001.
[107] See Article 123 of the Constitution; Articles 117 and 122, I of the Constitution; Articles 117, VI and 123, I of the Constitution respectively.
[108] Article 123, I, of the Constitution.
[109] Article 123, I, of the Constitution.

government', which is a consultative body between the Region and local authorities.[110]

Basic laws of the Ordinary Regions are passed according to an entrenched procedure, introduced by constitutional amendment act No. 1/1999. Regional legislatures pass them with an act approved with an absolute majority of their members, with two subsequent deliberations at an interval of not less than two months. This act does not require the approval of the Cabinet commissioner. However, the Cabinet can challenge its constitutional validity before the Constitutional Court within thirty days of their publication.

'Ordinary' Regions enjoy a degree of constitutional autonomy that is higher than that conferred to 'autonomous' regions. In this respect, the so-called autonomous Regions had their own 'basic law' (*statuto*) approved by a constitutional law of the State, without any significant participation or influence of regional Legislatures.[111] Nevertheless, under constitutional act No. 2/2001, special regional basic laws can be partially turned into 'regional' basic laws with regard to the form of government and the electoral system. The regional act amending the form of government and the electoral system must be approved by an absolute majority of the members of the regional legislature. This act can be submitted to popular referendum if a certain figure of the regional electors or of the members of the Regional Council so request.

III Relationships between Regional Basic Laws and the State and Regional Sources

108. The relations between regional basic laws and state law are governed according to the criterion of competence. Furthermore, regional basic laws regulate only those specific fields of legislation which the Constitution confers upon them. We define such fields of legislation as reserved matters: pursuant to Article 123 of the Constitution, the form of government and the basic principles of organisation can only be regulated by regional basic laws to the exclusion of State ordinary laws.[112] In a recent judgement, however, the Constitutional Court held that regional basic laws have to be consistent with national framework legislation falling under the concurrent legislation.[113] Regional basic laws are pieces of primary legislation and must regulate those contents referred to in Article 123 of the Constitution. In fact,

[110] Article 123, IV, of the Constitution.
[111] Art. 116, I, of the Constitution, and above § 79.
[112] CC n. 188/2007, n. 201/2008, n. 182/2011 and n. 188/2011.
[113] CC n. 35/2014.

they must contain provisions regarding the right to table bills before regional legislatures and promote abrogative referenda on laws and administrative measures of the Region as well as the publication of laws and regional regulations.[114] With regard to its formal effectiveness, regional Statutes (i.e. the regional statutory act) are hierarchically superior to other regional laws.[115]

IV Regional Laws

109. Regional laws are enacted by regional legislatures in accordance with the Constitution, the basic regional laws and the standing orders of Regional Legislatures. Although regional legislatures enjoy different degrees of legislative powers,[116] regional laws may be considered as a unitary category. In fact, all regional laws have the same *nomen juris* (i.e. the same legal definition: 'regional law') and are passed according to the same legislative process. They share common features as far their contents and constitutional limits are concerned.

Before the 2001 constitutional reform, 'ordinary' Regions only had a limited legislative power in specific fields listed in the national Constitution. The constitutional amendment act No. 3/2001 led to a reversal in the distribution of legislative powers: the State maintains exclusive legislative power on a limited number of matters[117] and Regions are vested with implied powers in all subject matters not expressly covered by State legislation.[118]

In this respect, the current distribution of powers between the State and regions is a reconfiguration of former State-Regions relationships. Whereas former Article 117 allowed regions to make laws providing that there was a constitutional foundation for their legislative powers, now regional legislative powers encounter only those limitations deriving from the existence of a subject matter reserved to State legislative powers.[119] The State, however, has exclusive legislative powers in the subject matters listed in Article 117, II, of the Constitution. This list covers subject matters that traditionally are prerogative of the central State, in order to preserve the legal and economic unity of the Republic. Apart from exclusive legislative powers,

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[114] Article 123, I of the Constitution.
[115] CC n. 81/2015.
[116] Exclusive legislative powers, concurring legislative powers, residuary legislative powers: see Part III, Chapter 1.
[117] Article 117, I, of the Constitution.
[118] Article 117, IV, of the Constitution.
[119] CC n. 282/2002.

the State may make laws in relations to the subject matters indicated in the list of specified heads of legislative concurrent powers. Article 117, III, of the Constitution lists the subject matters covered by concurrent legislation: legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation. A regional law, which does not comply with such fundamental principles set forth in the State legislation, is deemed to be inconsistent with the State legislation and the Constitution as well.[120]

The Constitutional Court stated that State legislation – which is still in force in those fields that are now devolved to regional legislation – might apply until Regional Legislatures 'cover' the same field with their laws. The legal effects of the 'covering the field' test are those typical of pre-emption.[121] Article 1, III of Law No. 131/2003 holds the same assumption.

Several important rulings rendered by the Constitutional Court after the 2001 constitutional reform had highly centripetal effects, thus developing an ever more centralistic doctrine. In the opinion of the Court, the principle of subsidiarity (Article 118, I, of the Constitution) allows the State to absorb regional legislative powers if there is the necessity to comply with the national concern.[122] Furthermore, it must be reminded that the reform only addressed ordinary Regions, but did not have a direct impact on the competences of 'special' Regions, whose powers still derive from their basic laws. Moreover, Article 10 of constitutional act No. 3/2001 establishes that, as long as the autonomous Regions do not change their basic laws, the broader forms of legislative autonomy set out in Title V of the Constitution, applies to them as well. In other words, the legislative powers of 'special' Regions can be considered as the outcome of the intersection of often overlapping and contradicting catalogues set forth in both the Constitution and their own basic laws.

V 'Atypical' Regional Laws

110. Among 'atypical' regional laws we number those concerning the regrouping of municipalities, which depart from the ordinary legislative procedure. Pursuant to Article 133, II of the Constitution, Regions may establish new Municipalities within their own territory and modify their districts and denominations. Laws establishing new municipalities and modifying their districts and denominations are *leggi-*

[120] CC n. 161/2012.
[121] CC n. 282/2002.
[122] CC n. 303/2003, 6/2004, 383/2005, 278/2010, 79/2011 232/2011, 163/2011, 7/2016, 61/2018.

provvedimento (i.e. legislative measures). They are approved by Regional legislatures 'after consultation with the populations concerned,' which means that a referendum must be summoned.[123] Regional legislatures can either receive or reject the proposed change approved by the electorate.[124] Whatever the legal nature of the referendum may be, it is hard to imagine that the representative body would disregard the will of the people. Although the State can determine the fundamental principles of organisation and functioning of municipalities, the Constitutional Court strongly affirmed that the State cannot not interfere with the regional exclusive jurisdiction over territorial regrouping.[125]

111. The 2001 constitutional amendments introduced new regional 'atypical' laws as well. Under Article 117, VIII, of the Constitution, regional laws ratify agreements reached by a region with another region aimed at the better exercise of their functions. Pursuant to Article 117, IX, of the Constitution, Regions ratify agreements with foreign States and understandings with territorial entities that belong to foreign states in the areas falling within their responsibilities. Finally, the basic laws of 'ordinary' regions introduced entrenched laws, such as financial records and laws adopting regional electoral systems.[126]

VI Regional Acts with Force of Law

112. Regions cannot enact decree-laws or legislative decrees. An act with force of law is that stemming from an abrogative referendum. Moreover, regional basic laws introduced new kinds of regional acts with force of law. Among them, we can mention the consolidated acts, which are approved by Regional legislatures. The standing orders of Regional legislatures are not sources of law.[127]

VII Regional Regulations

113. Regional regulatory powers have been comprehensively modified by the constitutional amendment acts No. 1/1999 and No. 3/2001. Article 121, II, of the Constitution originally vested Regional legislatures with *regulatory powers*. The constitution amendment act No. 3/2001 replaced Article 121, II of the Constitution without indicating which organ (either the legislature or the executive) should

[123] CC n. 50/2015.
[124] CC. n. 2/2018, and n. 21/2018.
[125] Article 117, II, p, of the Constitution and CC n. 261/2011.
[126] CC. 2/2004.
[127] CC n. 288/1987.

exercise regulatory powers. The Constitutional Court holds that regional basic laws are free to allot regulatory powers either to the legislature or to the executive.[128]

Moreover, regulatory powers shall be vested in the Regions with respect to the subject matters where they have legislative powers (i.e. exclusive and concurrent legislative powers). Under Article 116, VI of the Constitution, the State can delegate Regions to enact regulations in fields assigned to the Constitution.

Regional basic laws can set the same regulations envisaged at the State level: rules and regulations supplementing primary legislation; regulations organising public administration; 'delegated' regulations; regulations implementing European directives. The relationships between regulations and regional laws are governed according to the hierarchical principle. Regulations may be subjected to regional abrogative referenda. The relationships between regional sources and regulations delegated from the State to Regions under Article 116, VI of the Constitution are governed in accordance with the criterion of competence.

VIII Local Sources of law: Municipal, Metropolitan, and Provincial Basic Laws

114. Pursuant to Article 114, II, of the Constitution, Municipalities, metropolitan cities and provinces shall enact their own basic laws in accordance with the principles laid down in the Constitution. Municipal, metropolitan, and provincial basic laws set their internal organisation in order to fulfil the duties assigned to them. Local basic laws have to be approved by a majority of two-thirds of the Councillors; if such a majority is not achieved, two subsequent deliberations with an absolute majority will be required.[129] Secondly, the law indicates which subject matters have to be regulated by the basic laws.[130] Furthermore, it indicates the subject matters where the intervention of the basic law is optional.[131] Metropolitan cities enjoy an even broader sphere of autonomy, and their basic laws are enacted in accordance with Law No. 56/2014.

The organisation of the local government is a matter reserved to basic laws under the enabling legislation such as the local government acts No. 267/2000 and No. 56/2014. However, primary legislation cannot interfere with the constitutional autonomy of local authorities set forth in Article 114, II of the Constitution, which expressly protects the self-organisation of municipalities and provinces and the adoption of local basic

[128] CC n. 313/2003 and n. 119/2006.
[129] Article 6.2 of the Consolidated Act No. 267/2000 concerning local authorities.
[130] Article 6.2 of the Consolidated Act No. 267/2000 and Article 4, II of Law No. 131/2003.
[131] Articles 8.3 and 11.1 of the Consolidated Act No. 267/2000.

laws. Furthermore, local basic laws regulate only those specific fields of legislation conferred by the Constitution: to this extent, they are 'limited' sources. Article 6.2 of the Consolidated Act No. 267/2000 states that local basic laws must be comply with the principles established by the law.

IX Municipal and Provincial By-laws

115. Under Article 117, VI, of the Constitution, local regulations are enacted as by-laws. Indeed, Municipalities, Provinces, and Metropolitan Cities are granted regulatory powers for the organisation and implementation of the functions attributed to them.

Local regulations are typical examples of subordinate legislation, which implements national and regional primary legislation. The nature of local regulations is twofold. On the one hand, they implement State and Regions statutory provisions regarding local organisation (so-called organisational by-laws). On the other hand, regulations are hierarchically subordinate to State and regional laws. In addition, they supplement State and regional laws concerning the exercise of local functions in accordance with Articles 7 of the Consolidated Act No. 267/2000 and 4, IV of Law No. 131/2003 and the principle of competence. Hence, regulations accommodate State and regional legislation to local needs. According to the principle of competence, State and regional regulations cannot interfere in the ambits reserved to local by-laws. To this extent, Article 4, II of the general provisions of the civil code – according to which regulations of authorities other than the government may not be inconsistent with executive regulations – must be considered repealed.

§9 LABOUR AGREEMENTS

I Collective Agreements Under Article 39 of the Constitution

116. Article 39, IV, of the Constitution provided for collective labour agreements 'having mandatory effects for all workers belonging to the categories referred to in the agreement': these were called collective labour agreements with *erga omnes* effectiveness. In order to enter into these agreements, the Constitution states that the contracting trade unions must have been registered at the local or central offices, according to the provisions of the law. The Constitution also sets a condition for their registration: their by-laws must frame their internal organisation after democratic character. Moreover, the stipulation of the contract must be entrusted to a single representative body made up in proportion to the number of registered members of

the various stipulating unions.[132] In the event of inconsistency between primary legislation and labour agreements, it is the primary legislation which prevails.

II Private-Law Collective Agreements

117. Article 39 of the Constitution has never been implemented. As a consequence, labour relations are regulated by rules laid down in private-law collective agreements, which bind only workers belonging to the unions that stipulated the agreements.

Nevertheless, private-law collective agreements had their binding force extended beyond the contracting parties, achieving quasi-*erga omnes* effectiveness. Moreover, primary legislation[133] and the judiciary referred to private-law collective agreements for regulating labour relations, thus extending the guarantees the Constitution grants to workers.[134]

Relationships between statutory law and private-law collective agreements are governed by the same criteria applied for solving antinomies between primary legislation and *erga omnes* collective agreements. In the event of inconsistency, primary legislation prevails over the agreement.

§10 Trade Customs Referred to in Laws and Regulations

118. Customs directly envisaged by the Italian legal system are the so-called *usi* (trade customs). Under the general provisions of the civil code, they apply providing that laws and regulations expressly refer thereto.[135] Trade custom is therefore placed on the last rung of the hierarchical ladder, as a third- or fourth-level source: they must be consistent with primary and subordinate legislation, and with ministerial and inter-ministerial regulations as well.

As mentioned above, there is no room for *contra legem* customary sources within the Italian legal system, but only for *secundum* and *praeter legem* customary rules.

Trade customs must be collected in a special Official Gazette. Customary rules contained therein are deemed to exist unless it is otherwise proven.[136] The publication in those collections does not guarantee either the existence of the custom or the

[132] Article 39, IV of the Constitution.
[133] Article 2113 of the Civil Code.
[134] Article 36 of the Constitution.
[135] Article 8 of the general provisions of the civil code.
[136] Article 9 of the general provisions of the civil code.

correspondence of the collection itself to the customary rules in force. The parties will have to prove the existence of the custom and the custom rule. The judiciary cannot use the *iura novit curia* principle, and therefore shall decide on the fact, the law and its source.